No. 13345

United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

Petition for Review to Set Aside Order of the Federal Power Commission.

PETITIONERS' REPLY BRIEF

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MAY IT PLEASE THE COURT:

THE FAILURE OF PORTLAND GENERAL ELECTRIC COMPANY TO SECURE STATE APPROVAL FOR THE PELTON DAM IS AN ABSOLUTE BAR UNDER SECTION 9 (b) OF THE FEDERAL POWER ACT TO ISSUANCE OF A LICENSE FOR THE PROJECT.

Respondent and the Intervenor argue that the legislative history of the Federal Power Act and the provisions of the Act demonstrate conclusively that the Commission's license for the project is valid, notwithstanding the inability of the Company to comply with the laws of Oregon which Petitioners' claim are applicable. In this connection Respondent states (Brief pp. 17-19):

"Prior to 1920, when the Federal Water Power Act was enacted, water-power projects on lands of the United States could be constructed and operated pursuant to the Act of February 15, 1901 (31 Stat. 79). The 1901 Act related not only to land use but to water use as well, and permission could not be given except upon a finding by the proper official that the proposed development would not be incompatible with the public interest.

"The Federal Water Power Act of June 10, 1920, combined in one agency the control of water-power developments which had previously been exercised through the Departments of the Interior and Agriculture on lands of the United States and through the War Department on navigable waters. House Report No. 61, 66th Cong., 1st sess., dated June 24, 1919, stated that the purpose of the Power Act was to provide 'a method whereby the water powers of the country, wherever located, can be developed by a public or private agency under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest.' The efforts of

the Commission were to be 'directed toward a constructive national program of intelligent, economical utilization of our power resources.' This expression of the purpose of the Act would not appear to express any intent by Congress to separate Federal control over land use from Federal control over water use or water-power development, as suggested by Petitioners, since 'every legitimate public interest' could not be protected by the Commission without control over both land and water uses, subject, of course, to vested rights not claimed here which are protected by Section 27 of the Act.

"In the *First Iowa* case the Supreme Court has this to say concerning the purposes of the Act (pp. 180-181):

> 'It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
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> 'It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.'

"That Congress did delegate authority to the Commission to control water uses is expressly shown by the provisions of the Act. Section 4 (g) authorizes the Com-

mission to investigate 'any occupancy of, or evidence of intention to occupy, for the purpose of developing electric power, public lands, reservations * * *' and 'to issue such order as it may find * * * in the public interest to conserve and utilize the * * * water-power resources of the region.' Section 7 (a) requires the Commission to decide which of conflicting applications is best adapted to conserve in the public interest the water resources of a region. Both of these sections refer directly to the conservation of water resources whether in navigable streams or in non-navigable streams affecting lands of the United States. Section 10 (a) requires that any project licensed shall be best adapted to a comprehensive plan of development and, of course, such comprehensive development is not possible without Commission control over the use of available waters for power purposes.

"It is apparent that none of the sections of the Act looking directly to control of water use could be given any meaning in licensing projects on Government lands should the Court accept the Petitioners' interpretation of Section 9 (b) of the Act that the license issued for the Pelton Project is invalid because the Commission failed to require the Company to comply with State laws which Petitioners say control the water resources to be utilized by the project."

In the very recent case of Niagara Power Corp vs. Federal Power Commission, decided December 31, 1952, by the United States Court of Appeals for the District of Columbia (No. 10,862), it was held (p. 32), "An ap-

plicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

The question in this case was whether the Federal Power Commission correctly determined the amortization reserve liability, under section 10 (d) of the Federal Power Act, of a water licensee. Section 10 (d) provides, "that after the first twenty years of operation, use of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment * * * the licensee shall establish and maintain amortization reserves * * *."

Long prior to the enactment of the Federal Water Power Act of 1920, 41 STAT. 1063, the Niagara Falls Power Company was the owner of plants on the Niagara River which utilized water from that stream in generating electric energy. It had certain water rights in the Niagara river through mesne conveyances to it (the details of which are not of controlling signficance here), which rights it claimed were valid under the law of New York. After the passage of the Act of 1920, the Power Company applied to the Federal Power Commission for a license under the new statute to cover the operation of its existing plants and others then under construction. Such a license, which designated the plants as Project No. 16, was issued by the Commission on March 2, 1921.

After hearings, the Commission entered an order directing, among other things, that Niagara Falls Power Company (parent co. of Mohawk) place in an amortization reserve the sum of $914,432.04 as one half of surplus earnings March 2, 1941, to December 31, 1946.

In fixing that figure the Commission increased the Power Company's computation of its amortization reserve liability by $399,000. This was the result of two findings and conclusions: (a) the Commission disallowed as operating expense the Power Company's annual payment of $99,000 to International Paper Company for the right to use 730 cubic feet per second (cfs) of water for power development,—a water right which had been conveyed to the Power Company by the Paper Company by defeasible grant which reserved that yearly payment. The total disallowance for the initial period on this score was $577,500. (b) The Commission artificially increased the Power Company's revenue for the initial period by $220,500, by disallowing a rate concession amounting to that sum which had been given by the Power Company to its parent, Buffalo Niagara Electric Corporation, as the consideration for the right to use 262.6 cfs of water for power development—the "Pettebone-Cataract" water rights—which it had acquired from Buffalo Niagara by contract.

These two adjustments increased the Power Company's surplus earnings for the initial period by $798,000. One half of that sum—$399,000—is the amount by which the Commission's order increased the required amortization reserve. The Commission's order which

disallowed the rate concession to Buffalo Niagara and the payments to International Paper during the initial period also required that they be disregarded in computing amortization reserve liability during the remainder of the license period.

Niagara-Mohawk became the owner of all the assets of Niagara Falls Power Company and succeeded it as licensee of Project No. 16, thereby becoming subject to the Commission's order which we have just described.

In a petition for review, Niagara-Mohawk sought to have modified the Commission's order by holding that Buffalo Niagara and International Paper had valid water rights for the use of which it was obligated by a contract, together with the considerations which the Commission had disallowed; and to reduce accordingly the required amortization reserve.

Niagara Mohawk's remote predecessors in hydraulic power development at Niagara Falls constructed a canal, which was completed in 1861, tapping the Niagara River nearly a mile above the Falls and conveying water to a canal basin on the High Bank of the river approximately one-half mile below the Falls. The proprietors of the canal conveyed various mill sites to others with rights to use water for generating power. This water was drawn not from the river but from the canal basin. The general method of power development at that time was to sink shafts or pits at the edge of the cliff under the mills, and to use water from the canal to drive turbines at the bottom of the pits. After such use the water

escaped through tunnels to the face of the High Bank and thence back into the river.

The petitioner's later predecessors, as a part of the program of developing and disposing of electric energy, continued the policy of purchasing various tracts of land in the vicinity of their power facilities to be sold or leased to industrial power customers, sometimes with the right to use water to develop power. Out of this practice arose the two water rights involved in this proceeding.

The Federal Power Commission contended that the water rights of the Petitioner were invalid for the reason that there cannot be private ownership of the water of a navigable river of the United States. In rejecting the Commission's contention, the court said (pp. 13-16):

> "We observe, however, that the water rights in question do not rest upon a claim of ownership of the running waters of the Niagara. It is a usufructuary property right in the waters which is asserted—a vastly different thing, which was recognized at common law and has been confirmed by judicial decisions.
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> "The distinction between absolute ownership of flowing waters and the right to use them temporarily was aptly stated in *Sweet v. City of Syracuse,* 129 N. Y. 316, 335, 27 N. E. 1081, 1084 (1891):
>
> > ' . . . It is a principle, recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes, (2 Bl. Comm.

> 18:) "Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein." While the right of its use, as it flows along in a body, may become a property right, yet the water itself, the *corpus* of the stream, never becomes, or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquire or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, . . .'

"So, although neither Buffalo Niagara, nor International Paper, nor Niagara Mohawk has any title to the water flowing in the Niagara, the question is whether they have 'a temporary, transient, usufructuary property therein.' That depends upon the law of New York because, as the Supreme Court said in *United States v. Chandler-Dunbar Company,* 229 U. S. 53, 60 (1913),

> 'The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law.'

"Under the law of New York a riparian owner's right to use the waters of a stream for power purposes is a part of his estate, *United P. B. Company v. Iroquois P. & P. Company,* 226 N. Y. 38, 123 N. E. 200 (1919); *Waterford Electric Light, Heat and Power Company v. The State of New York,* 208 App. Div. 273, 203 N. Y. Supp. 858 (1924), *affirmed* 239 N. Y. 629, 147 N. E. 225, and is a corporeal hereditament, *Van Etten v. The City of New York,* 226 N. Y. 483, 124 N. E. 201 (1919).

"This usufructuary right is an incident to rapari-an ownership and does not depend upon grant or prescription. It is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor; but, until the State exercises its paramount right, the riparian owner's usufructuary right is unimpaired. These principles were stated by the New York courts in *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company v. Smith,* 70 App. Div. 543, 75 N. Y. Supp. 1100 (1902), *affirmed* without opinion 175 N. Y. 469, 67 N. E. 1088 (1903), with express reference to the water rights from which those in question here derive. The court said that Niagara Falls Hydraulic Power, one of Niagara Mohawk's predecessors,

> '. . . as a riparian owner and as owner of the lands under the waters of the Niagara River adjacent to its uplands from which the water is immediately taken, has the right to *use* of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it does, after passing over its own lands (citations), subject only to the paramount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream; such right being in no sense in the nature of a franchise, but a corporeal hereditament, not depending either upon grant or prescription.' (Emphasis supplied)

"Since the usufructuary property right of Niagara Falls Hydraulic and its successors was and is

subject to the superior right of the State of New York, in order to see whether the right still exists it is necessary to ascertain whether the State has exercised its paramount authority and, if so, to what extent."

And (p. 17),

"From the various legislative enactments to which we have referred, it is seen that New York has exercised its sovereign paramount authority to regulate the use of Niagara waters by restricting the original riparian rights upon which the Pettebone-Cataract and International Paper rights depend. It has limited the quantity of water which may be used, and has exacted a rental charge for its use. But the legislature has not destroyed the riparian rights, as it might have done by pre-empting the entire available flow; rather, it has confirmed the rights as limited and defined in the several statutes."

Also (p. 19),

"In summing up its argument that the water rights asserted here do not exist under the law of New York and should not be recognized by this court, the Power Commission assigns three reasons for its position: (a) 'there can be no perpetual right to use the water of a navigable river'; (b) 'any permission given by the State may be withdrawn at any time when the State so decides, without compensation for the loss of the privilege'; and (c) 'It has not been shown that either Buffalo Niagara or International Paper Co. held authority from the State Water Power and Control Commission to use the water from March 1 (sic), 1941, to December 31, 1946.' None of these reasons supports the Commission's conclusion."

In holding that the water rights in question were valid usufructuary property rights under the New York law, the Court said (pp. 32-34):

"Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the *First Iowa* case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him.

"The Power Commission says in the course of its argument, 'Neither Buffalo Niagara nor its predecessors in interest, nor the International Paper Company own any lands riparian to the Niagara River to which the alleged water rights are claimed to be appurtenant.' It also states that neither Buffalo Niagara nor International Paper has a license, with respect to the rights, from either the Federal Power Commission or the New York Water Power and Control Commission.

"The statement that neither Buffalo Niagara nor its predecessors in interest own any riparian land to which the Pettebone-Cataract water rights are appurtenant is incorrect. The Niagara Falls Hydraulic Power and Manufacturing Company owned such riparian land and, by valid grant to the Pettebone-Cataract companies, severed from the land the right to take 262.6 cfs under a partial head,

reserving the right to utilize that water under the remaining head. The Pettebone-Cataract rights passed to Niagara Lockport, which was succeeded by Buffalo Niagara. It is thus seen that Buffalo Niagara's predecessor in interest owned riparian land. The right to 262.6 cfs, though severed, continued to be in the nature of a riparian right. Such a corporeal hereditament is a property right which may be conveyed apart from the land to which it is incident. The water rights of International Paper had a similar origin.

"Nor is it necessary to the validity of the two sets of usufructuary property rights that Buffalo Niagara and International Paper have either state or federal licenses. Such authority must be held by him who exercises the rights. Niagara Mohawk, which is the user, holds a federal license therefor and, as we have shown, is not required to have a State license because it pays rent to the State of New York for the water utilized.

"We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; that the Treaty of 1910 did not destroy them but preserved their integrity; that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law; that the payments made by the petitioner under its contractual obligations as lessee of the water rights are proper operating expenses.

"It follows that the Federal Power Commission erred in disallowing the payments in question and in increasing on that account the petitioner's amortization reserve liability. The case will be remanded to the Commission with instructions to modify its order of September 27, 1950, in accordance with the views herein expressed."

CONCLUSION

Petitioners submit that neither the respondent nor the intervenor has met or has refuted any of the propositions of law advanced by the petitioners on this review. On the contrary, their theory of the case under which they seek to support the validity of the order of the respondent issuing the license herein, has been completely repudiated by the Court in the Mohawk case.

Petitioners therefore respectfully pray that the order of the Federal Power Commission be set aside.

Respectfully submitted,

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